(1)

90-813

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve a conflict between the circuits as to whether Section 2 of the Voting Rights Act, as amended, governs the election of judicial officers?

2. Does Section 2 apply to the election of all judicial officers, including trial judges?

PARTIES

The participants in the proceedings below were:

League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr. Jom Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, *Plaintiffs;*

The Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, *Plaintiff-Intervenors;*

Jesse Oliver, Fred Tinsley and Joan Winn White, *Plaintiff-Intervenors;*

Jim Mattox, in his capacity as Attorney General of the

State of Texas; George Bayoud, Secretary of State of Texas; Thomas R. Phillips, Mike McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, John Cornyn, Robert Blackmon, Sam B. Paxson, Weldon Kirk, Jeff Ealker, Ray D. Anderson, Joe Spurlock II, and Leonard E. Davis, in their capacity as members of the Texas Judicial Districts Board; *Defendants;*

Judge Sharolyn Wood and Judge Harold Entz, *Defendant-Intervenors.*

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Petitioners Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, and Francis Williams respectfully pray that a writ of certiorari issue to review the judgement and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding September 28, 1990.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 914 F.2d 620 as *LULAC v. Clements*, and is set out at pp. 1a-182a of the appendix hereto ("App,"). The opinion of the United States District Court for the Western District of Texas is not reported at and is set out at pp. 183a-304a of the appendix, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court.

In addition to the opinions in this case, a letter from Assistant Attorney General John Dunne, dated November 5, 1990 interposing an objection to fifteen additional district judgeships in Texas is set out at pp. 304a-308a of the appendix hereto.

JURISDICTION

The decision of the Fifth Circuit was entered on

September 28, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, which provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by a State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the politcal process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision in one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class

elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The Proceedings Below

This case was filed in the Western District of Texas on July 11, 1988[1] on behalf of Mexican American and African American voters challenging the at-large election of district

[1]In October 1988, the district court for the Western District of Texas stayed all proceedings in this case pending this Court's decision on a writ of certiorari filed in *Chisom v. Roemer. Docket No. 88-327.* In that case, in which African American voters challenged the multi-member configuration of the First Supreme Court District in Louisiana, a panel of the Fifth Circuit held that judicial elections are covered by Section 2 of the Voting Rights Act. 839 F.2d 1056 (5th Cir. 1988) This Court denied certiorari on November 14, 1988. 488 U.S. __, 102 L.Ed.2d 379 (1988). After a trial on the merits, the district court in *Chisom* held that the plaintiffs had not established that the method of electing supreme court justices in Louisiana violated either the Voting Rights Act or the Constitution. The *Chisom* plaintiffs appealed their claim under the Voting Rights Act to the Fifth Circuit.

On November 2, 1990, the Fifth Circuit issued an order in *Chisom*, remanding the case to the district court for dismissal of the complaint in light of the court's decision in *LULAC*. African American plaintiffs in *Chisom* filed a petition for a writ of certiorari to this Court on November 14, 1990.

judges in 11 counties in Texas.[2]

On February 28, 1989, the district court granted the intervention of the Houston Lawyers' Association (HLA) and five African American voters from Harris County, Texas (hereafter referred to as "petitioners"), as well as the intervention of four African American voters from Dallas County, Texas. The petitioners challenged the at-large, winner-take-all, majority vote, numbered post requirement for electing district judges, on the grounds that this winner-take-all method of electing judges denies African American voters an equal opportunity to elect candidates of their choice and to participate in the political process in violation of §2 of the Voting Rights Act of 1965, as amended. Petitioners also alleged that the winner-take-all at-large election requirement for district judges was adopted and

[2]Originally, plaintiffs challenged the at-large method of electing district judges in 44 counties in Texas. Plaintiffs later withdrew their claim against the electoral system in 33 counties.

maintained for the purpose of diluting African American voting strength in violation of §2 and the Fourteenth and Fifteenth Amendments to the Constitution.[3] The petitioners showed that under a single-member district electoral scheme, or a modified at-large electoral system which removed the winner-take-all feature of the current electoral scheme, African American voters would be able to elect their preferred candidates as district judges. *See*, Complaint in Intervention of Houston Lawyers' Association, *et. al*, at paragraph 42.

A trial on the merits in *LULAC* was held in September 1989. The district court found that the current method of electing district judges in every county challenged in the lawsuit, violates §2 of the Voting Rights Act in that it denies Mexican American and African American voters an equal opportunity to elect their candidates of choice to the district

[3]Plaintiffs did not appeal the district court's rejection of their claim of intentional discrimination.

court bench. The district court made specific findings following the guidelines set out by this Court in *Thornburg v. Gingles* 478 U.S. 30 (1986), for analyzing a claim of racial vote dilution under the §2 "results" test. The district court also found that the "typical factors" enumerated in the Senate Report[4] accompanying the 1982 amendments to the Voting Rights Act, which tend to demonstrate that an electoral scheme dilutes the voting strength of minority voters, pointed overwhelmingly to the existence of vote dilution in Texas' district judge election system.[5]

On January 2, 1990, the district court entered an order setting out an interim remedy for the 1990 election of judges only, incorporating some elements of a settlement agreement entered into by the petitioners and the State defendants. The

[4]Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982)

[5]This Court has recognized the Senate Report as the "authoritative source for legislative intent" in interpreting amended Section 2. *Gingles*, 478 U.S. at 43, n.7.

Fifth Circuit stayed the district court's interim order in *LULAC* on January 11, 1990, upon motion of the defendant-intervenor incumbent judges. An interlocutory appeal was filed by defendant-intervenors on January 4th and granted by the Fifth Circuit on January 11, 1990.

Oral argument was heard before a panel of the Fifth Circuit in both *LULAC* and *Chisom* on April 30, 1990. Eleven days after oral argument, the panel reversed the district court opinion in *LULAC* on the ground that the election of trial judges is not covered by Section 2.

Sua sponte, the Fifth Circuit ordered rehearing *in banc* in *LULAC*. Oral argument was heard on June 19, 1990. On September 28, 1990, the Fifth Circuit, without reference to the merits of the case, reversed the district court's ruling in *LULAC* by a 12-1 majority. By a 7-6 majority, the Fifth Circuit also overruled its prior decision in *Chisom v. Edwards* and held that the "results" test for vote dilution in

amended §2 of the Voting Rights Act does not apply to the election of judges, "for the cardinal reason that judges need not be elected at all." *LULAC v. Clements*, 914 F.2d 620, (5th Cir. 1990). Five judges, in an opinion authored by J. Higginbotham, adhered to the position taken by the panel that while appellate judges are covered by Section 2, trial judges are not. J. Johnson, the author of the original panel opinion in *Chisom*, dissented.

Statement of Facts

The State of Texas elects 375 districts judges from districts which, in accordance with the Texas Constitution as amended in 1985, may be no smaller than an entire county. *See* Texas Constitution of 1876, as amended, Art. 5 §7 (a)(i). In addition to the countywide election requirement, district judges must run for numbered posts and a candidate must receive a majority of the vote cast to win the primary

and general election. Although Texas' district judges sit in the counties from which they are elected, district judges have statewide jurisdiction in trial courts of general jurisdiction. Every county in which plaintiffs challenged the at-large electoral system elects more than one district judge.

Harris County is the largest county in the state of Texas both by geographic size and by population.[6] Harris County is also served by the largest number of district judges in the state -- 59. Although the African American population of the County is nearly 20%, and the African American voting age population is 18%, only three of Harris County's 59 district judges at the time of trial, or 5.1%, were African American. It was undisputed that this was the largest number of African Americans to ever serve as district judge at the same time in Harris County. Trial Transcript, Vol. 3 at p.207. The district court further found that although 17

[6]According to the 1980 Census, the population of Harris County is nearly 2.5 million.

African American candidates have run for district judge in Harris County since 1980, only 2 won. App. at 279a.

Petitioners demonstrated that voting is extremely racially polarized in Harris County. In 17 contested elections involving African American and white candidates, white voters never gave more than 40% of the their vote to African American candidates. *See* Supplemental Appendix at p.1. African American voters however, persistently gave more than 96% of their vote to African American candidates. App. at 215a. Race also consistently outweighed party affiliation in district judge elections in Harris County. In 1986 for example, every white Democratic incumbent district judge was reelected to office. Every African American Democratic incumbent district judge lost the same election. Trial Transcript at Vol. 3, p.139. The district court found, and the overwhelming evidence introduced at trial proved, that race continues to effect the

outcome of district judge elections in the 11 counties involved in the suit. App at 217a. The district court also found that it would be possible to afford minority voters an equal opportunity to elect their candidates of choice to the district court bench through the adoption of an alternative electoral scheme. *See, e.g.,* Interim Order of District Court, January 2, 1990. Petitioners were prepared to present, at a remedial hearing, several potential alternative election schemes to "completely remed[y] the prior dilution of minority voting strength and fully provid[e] equal opportunity for minority citizens to participate and to elect candidates of their choice." Senate Report No. 97-417, 97th Cong., 2nd Sess., at p.31 (1982) [hereafter "S.Rep."]. Two of these alternative remedies, cumulative and limited voting, modify the at-large electoral structure by removing the "winner-take-all" feature and lowering the "threshold of exclusion" for minority voters. It was alleged by the

petitioners that either cumulative or limited voting would cure the proven violation and give African American voters in Harris County an equal opportunity to elect district judges.

Petitioners' alternative electoral schemes, alleged in their complaint, were not yet considered by the district court, who entered an interim remedial order without holding a remedial hearing.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S PER SE RULE THAT AT-LARGE JUDICIAL ELECTIONS CANNOT BE CHALLENGED UNDER SECTION 2 OF THE VOTING RIGHTS ACT SQUARELY CONFLICTS WITH THE ONLY OTHER COURT OF APPEALS TO DECIDE THIS ISSUE

This case raises the same issue raised by *Chisom v. Roemer*, for *writ of certiorari*: whether Section 2 of the Voting Rights Act governs judicial elections. However, this case raises a further important issue not present in *Chisom* -- whether Section 2 governs the election of trial court judges as well as appellate court judges. Therefore, *certiorari* should be granted in both cases.

A. The Question Whether Section 2 Governs the Election of Judges Is One of National Importance

The Fifth Circuit's interpretation of the scope of §2 in *LULAC* has far reaching implications for voters throughout the country. As was noted by the petitioners in *Chisom*, cases challenging the election of judges under Section 2 of the Voting Rights Act have been brought in Ohio, Louisiana, Texas, Florida, Alabama, Georgia, Arkansas, Illinois, Mississippi and North Carolina.[7]

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[7] *See Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988) (challenge to the countywide election of municipal judges in Cincinnatti, Ohio); *Chisom v. Roemer, supra; Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988) (challenge to at-large election of family court, district court, and court of appeals judges in Louisiana); *Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla. 1990) (challenge to the at-large election of trial judges in the Fourth Judicial Circuit in Florida); *SCLC v. Siegelman*, 714 F.Supp. 511 (M.D. Ala. 1989) (challenge to the numbered post, at-large method of electing circuit and district court judges in Alabama); *Brooks v. State Bd. of Elections*, Civ. No. 288-146 (S.D.Ga. 1989) (challenge to at-large method of electing superior court judges in Georgia under §§2 and 5 of Voting Rights Act); *Hunt v. Arkansas*, No. PB-C--89-406 (E.D. Ark. 1989) (challenge to the at-large method of electing circuit, chancery, and juvenile court judges in Arkansas); *Williams v. State Bd. of Elections*, 696 F.Supp. 1563 (N.D. Ill. 1988) (challenge to the at-large method of electing Supreme Court, Appelllate and Circuit

The Fifth Circuit's decision in *LULAC* has already begun to affect the rights of voters in those cases. In three of the cases, *SCLC v. Siegelman, supra, Nipper v. Martinez, supra, Hunt v. Arkansas, supra,* the respective district judges have ordered briefing from the parties on defendants' motions for reconsideration and motions to dismiss. Considerable prejudice to the rights of both voters and candidates in those jurisdictions could result should this Court fail to review *LULAC*.

Moreover, the confusion created by the Fifth Circuit's decision that Section 2 and Section 5 of the Act do not operate in tandem for the election of judges in and of itself compels review by this Court. Section 5 and Section 2 have traditionally been interpreted to have concurrent application.

Court judges from Cook County, Illinois); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987) (challenge to the at-large election of judges to state chancery and circuit courts in three counties in Mississippi); *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C.) (challenge to the statewide election of state superior court judges in North Carolina).

This Court recently affirmed that Section 5 of the Voting Rights Act covers the election of judges, *Brooks v. State Bd. of Elections* 59 U.S.L.W. 3293 (October 15, 1990), and reaffirmed its decision in *Haith v. Martin*, that "the Act applies to all *voting* without any limitation as to who, or what is the object of the vote." 618 F.Supp. 410, 413 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (emphasis in original). The traditional view that both Section 2 and Section 5 apply to "all voting" is based on Sections 2 and 5's shared definitional section in the Act,[8] and follows Congress' specific direction that,

> under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e, litigation or preclearance. The lawfulness of such a practice should not vary depending upon when it was adopted, i.e.. whether it is a change.

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[8]Indeed "Section 5 uses language nearly identical to that of Section 2 in defining prohibited practices -- 'any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.'" *Mallory v. Eyrich*, 839 F.2d 275, 280 (6th Cir. 1988).

House Report No. 97-227, 9th Cong., 1st Sess., at p.28 (1982) [hereafter "House Rep."].

However, under the *LULAC* majority's analysis,

> if a jurisdiction has a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if a state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented.

Higginbotham concurring, App. at 87a-88a . Such a conflicting and contradictory application of the Act will prejudice the rights of voters in jurisdictions with existing discriminatory judicial election schemes.

This point is powerfully illustrated by the Justice Department's recent objection, under the preclearance provisions of Section 5, to fifteen additional district judgeships in Texas. On Monday November 5, 1990, the Justice Department interposed an objection in Tarrant, Dallas, and Lubbock Counties to the additional district

judgeships on the grounds that "the at-large method of election [of these district judgeships] even considered in isolation from the numbered post and majority-vote features, produces a discriminatory result proscribed by Section 2." *See* Letter of Assistant Attorney General John Dunne, App at 312a. The Attorney General also noted that,

> [t]he *LULAC* court. . . expressly recognized that 'Section 5 of the Act applies to state judicial elections' and *until this matter is further clarified by the courts we seen no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.*

Id.(citation omitted)(emphasis added).

It was the same at-large method of electing district judges in each of these three counties that was at issue in LULAC. This is exactly the "incongruous result" anticipated by Judge Higginbotham in his concurrence in LULAC.

This Court should review this critical issue.

B. *The Fifth Circuit's Decision in LULAC Squarely Conflicts with the View of the Only Other Circuit to Decide the Issue of Section 2's Applicability to the Election of Judges*

In reaching its conclusion in *Chisom I*, that judicial elections must be covered by Section 2, the Fifth Circuit relied substantially upon the same reasoning as did the Sixth Circuit in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). The Fifth Circuit in *LULAC* now overrules *Chisom I*, for reasons which directly conflict with the Sixth Circuit's analysis in *Mallory*.

In *Mallory*, the Sixth Circuit held that §2 of the Voting Rights Act covers the election of municipal trial judges in Hamilton County, Ohio. Based on its analysis of the statute, legislative history and judicial interpretation of the Act, the Sixth Circuit concluded, in particular, that there is "no basis in the language or legislative history of the 1982 amendment [to the Act] to support a holding that [the] use of the word

'representatives' was intended to remove judicial elections from the operation of the Act." 839 F.2d at 280.

This holding squarely conflicts with the Fifth Circuit's conclusion in *LULAC* that Congress *specifically* intended by using the word "representatives" to exclude the election of judges from coverage under Section 2, and sought instead to "leave [the election of judges] to be regulated and controlled by state law, by the Constitution, or by other provisions of the Voting Rights Act." App. at 25a.

Moreover, *Mallory* involved trial court judges. Therefore, its holding that Section 2 governs judicial elections squarely conflicts with the holding of the *LULAC* panel and 5 members of the *in banc* court that Section 2 governs only the election of appellate court judges. This conflict between the Fifth and Sixth Circuit's interpretation of Section 2's applicability to the election of judges should be resolved by this Court.

II. THIS COURT SHOULD REVIEW *LULAC* IN ORDER TO RESOLVE COMPLETELY THE QUESTION OF SECTION 2'S APPLICABILITY TO THE ELECTION OF JUDGES

Review should be granted in this case and it should be heard at the same time as *Chisom v. Roemer*. Unlike *Chisom*, this case raises the additional question whether a Section 2 vote dilution analysis can apply to the election of trial judges. Review of this question is critical to determine the broad issue of Section 2's applicability to the election of judges. Moreover, this question is at the heart of the *LULAC* petitioners' claims.

Judge Higginbotham's concurrence in *LULAC*, joined by four other members of the Fifth Circuit, offers an alternative interpretation of the scope of the Voting Rights Act that draws a distinction between the application of Section 2 to the election of trial and appellate judges.

Concluding that Section 2 applies to the election of judges in general, Judge Higginbotham contends that because subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government, change the nature of the decision making body, and would diminish the appearance if not fact of judicial independence, the election of trial judges cannot be challenged under Section 2's results test. *See*, Higginbotham concurrence at 91a-112a.

By contrast, according to Judge Higginbotham, the election of appellate judges to "multi-member decisionmaking bodies," lends itself naturally to a single-member district remedy, and as such, can be challenged under Section 2. *Id*. Following Judge Higginbotham's reasoning, petitioners in *Chisom*, who challenged the election method for the Louisiana Supreme Court, could prevail in their vote dilution claim for appellate judges, but *LULAC*

petitioners would be precluded from bringing a similar claim against the election of trial judges.

This interpretation of Section 2 renders irrelevant the factual findings of vote dilution made by a district court, and unjustifiably relies on reservations about the propriety of one hypothetical remedial strategy as the sole basis for restricting of the scope of the Voting Rights Act. Judge Higginbotham's analysis is perhaps most disturbing in that it bases the Act's entire substantive coverage on the court's perception of the adequacy of one possible fact-specific remedy, which the parties never developed or presented at a full remedial hearing.

In *LULAC*, where the petitioners alleged *inter alia* that an alternative modified at-large remedy could cure the proven violation and where no remedial hearing was held, Judge Higginbotham's interpretation of the Act is particularly ironic. In effect, although Judge Higginbotham

holds out the promise of applying the Voting Rights Act to minority voters challenging judicial elections, he denies relief to minority voters when vote dilution is proven.

Indeed, failure to review Judge Higginbotham's interpretation of the Act may irreparably impair the rights of minority voters in Texas. Should this Court grant review of *Chisom*, which involves a challenge to the election of appellate judges, and ultimately rule in favor of the *Chisom* petitioners, *LULAC* petitioners would be remanded to a panel of the Fifth Circuit predisposed to dismiss their claim, this time on grounds potentially not addressed by the Court in *Chisom*. The *LULAC* petitioners would then seek review by this Court next year on the same issue. Pursuing this time-consuming and pointless course on remand could effectively preclude the *LULAC* petitioners from obtaining relief in time for the qualifying period of the 1992 judicial elections. Such a result would be needlessly prejudicial to

the *LULAC* petitioners. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Therefore, this court should grant review of both *Chisom* and *LULAC*.

The question of Section 2's application to the election of trial judges is also of particular and independent significance from the broad question raised by *Chisom*. Judge Higginbotham's likening of the 59 district judges elected from Harris County to individual governors or mayors elected to single offices, is at odds with this Court's view of trial judges. Other courts, including the district court summarily affirmed by this Court in *Haith*, have regarded trial judges elected to numbered posts within a jurisdiction as "designated seats in multi-member districts." 618 F.Supp. at 414. *See also SCLC v. Siegelman*, 714 F.Supp at 517-518. As noted above, the Sixth Circuit also adhered to this view of trial judges in *Mallory*.

Judge Higginbotham's view of trial judges may affect the outcome of nearly every case challenging the election of judges under the Voting Rights Act, since in eight of the states where the election of judges has been challenged under Section 2, minority voters have challenged the election of trial judges. In the three cases in which district courts in the Eleventh and Eighth Circuits, respectively, have ordered briefing on the issue of Section 2's application to the election of judges in light of *LULAC*, the judicial offices at issue are trial judges, whose function and jurisdiction is nearly identical to the district judges at issue in Texas. *See Nipper v. Martinez* (trial judges in Fourth Judicial Circuit of Florida); *SCLC v. Siegelman* (circuit and district court judges in Alabama); *Hunt v. Arkansas* (circuit, chancery, and juvenile court judges in certain counties in Arkansas). The question of Section 2's application to trial judges is directly relevant to these three pending cases.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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